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Response: Rethinking the Direction of the Alien Tort Statute

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Response: Rethinking the Direction of the Alien Tort Statute

JULIAN KU*

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Despite the voluminous academic literature on the origins, purpose, and significance of the Alien Tort Statute (ATS),[1] there has been very little attention paid to the policy consequences of allowing wide-ranging litigation under the statute. Alan Sykes's economic analysis of ATS litigation against corporations, therefore, fills an important gap in the ATS literature. It is the first attempt to apply a rigorous law and economics analysis to the ATS. This intervention is especially important as the Supreme Court reconsiders the role of federal courts in the management of ATS litigation.[2]

This brief Response will consist of two Parts. First, I will review the academic debate on the use of the ATS, with a special focus on the use of the ATS to sue business corporations. Advocates of an expansive use of the ATS have often argued that ATS litigation has an important expressive purpose to assist in the development and internalization of international law norms. To protect this "norm development" purpose, ATS defenders have argued that federal courts can and should be able to manage the development of legal standards governing corporate ATS litigation. Critics have attacked the doctrinal foundation for this use of the ATS but have rarely offered functional or policy critiques of the consequences of an expansive reading of the ATS.

It is here that Professor Sykes's economic analysis clarifies the stakes in the debate over the ATS. His paper helps us see that giving federal courts authority

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1. Judiciary Act, ch. 20, § 9, 1 Stat. 73, 70–77 (1789).

2. *See* Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111 (2d Cir. 2010), *cert. granted*, 132 S. Ct. 472 (2011).

to proceed with corporate ATS litigation will require them to consider and resolve a number of complex policy choices. These include managing the high cost of foreign sovereign backlash, the effect of ATS exposure on foreign investment in the United States, and the competitive disadvantage of defendants subject to ATS litigation against those that are not. The question for advocates and scholars going forward, then, is whether the federal courts are best positioned to manage these complex policy consequences.

I. BACKGROUND

A. THE DEBATE OVER THE ATS

Since the federal courts revived the ATS in the 1980s, the statute has been the subject of substantial academic literature. Many scholars have welcomed the ATS as the long-missing entry point for international law and human-rights norms into the U.S. legal system.[3] As ATS cases became more frequent, legal scholars and advocates began to focus on the ATS as a crucial mechanism for developing international law norms, especially international human rights law.[4] This conception of the ATS, and the eventual defense of its usefulness, is rooted less in the direct practical effects of ATS litigation and more in the expressive impact of ATS litigation on international norms.

The importance of "norm development" as a justification for the ATS can be seen in the scholarship of Harold Koh. In a series of articles in the 1980s and early 1990s, Koh explained and justified ATS litigation as a way to allow advocates to pursue claims under international law in U.S. courts.[5] Thus, even if ATS litigation was unsuccessful in winning judgments for plaintiffs, it could still have benefits for normalizing the acceptance of key international law norms. Another prominent scholar, Anne-Marie Slaughter (née Burley), offered a similar justification when she described the ATS as a "badge of honor" for the

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3. *See, e.g.*, Anthony D'Amato, *The Concept of Human Rights in International Law*, 82 COLUM. L. REV. 1110, 1122 n.54 (1982) (citing landmark ATS case, *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980), as an example of effective domestic enforcement of international legal norms); John Dugard, *The Application of Customary International Law Affecting Human Rights by National Tribunals*, 76 AM. SOC'Y INT'L L. PROC. 245, 247–48 (1982) (citing *Filártiga* as "the prime example of the transplantation of a newly recognized customary international law right" into domestic law); Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1557 n.9 (1984) (citing *Filártiga* as an example of how international law can become domestic law).

4. *See, e.g.*, Harold Hongju Koh, *Addison C. Harris Lecture: How Is International Human Rights Law Enforced?*, 74 IND. L.J. 1397, 1414 (1999) [hereinafter Koh, *Human Rights Law*] (describing how *Filártiga* and subsequent Alien Tort cases helped to build support for ban on torture); Harold Hongju Koh, *The 1998 Frankel Lecture: Bringing International Law Home*, 35 HOUS. L. REV. 623, 646–55, 664–66 (1998) (describing the process of international law norm internalization and citing Alien Tort cases as examples); *see also* Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT'L L. 461, 489–93 (1989) (defending the use of Alien Tort litigation to vindicate broader abstract norms); Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2640 n.209 (1997) (book review) (noting failure of some international law theorists to appreciate ability of Alien Tort litigation to internalize international legal norms).

5. *See, e.g.*, Koh, *Human Rights Law*, *supra* note 4, at 1413–14.

United States and a symbol of its commitment to enforcing international law norms.[6] In both cases, the ATS's importance lies less in the outcomes of actual cases and more in its symbolic and expressive importance for U.S. foreign policy and for the development of international law.

In contrast to the ATS's academic defenders, critics of the statute have focused almost exclusively on the doctrinal weaknesses and constitutional problems created by modern ATS litigation. The earliest and most prominent critic, then-Judge Robert Bork of the U.S. Court of Appeals for the District of Columbia Circuit, offered a narrow reading of the ATS which did not permit the recognition of a cause of action without congressional authorization.[7] Bork's "cause of action" critique of the ATS implicitly rejected the "norm development" vision of the ATS. Instead, invoking separation of powers, Bork's critique sought to reserve such norm development for Congress and the President.[8]

In the late 1990s, some scholars joined the doctrinal attack on the ATS, this time invoking federalism. In order to justify Article III subject matter jurisdiction, courts in ATS cases generally accepted the view that customary international law was a form of federal common law which raised federal questions.[9] But the conclusion that customary international law is federal law is hardly self-evident from the text of the Constitution and was similarly not well supported in pre-*Filártiga* precedent.[10]

These two lines of attack on the ATS—one rooted in separation of powers and the other rooted in federalism—eventually migrated into judicial considerations of ATS lawsuits. In 2004, the Supreme Court partially settled this debate, holding that the ATS did not create a cause of action but that it should be interpreted to authorize a limited federal court common law power to recognize certain claims under customary international law.[11] The Court left a number of questions unsettled, however, including the application of its approach to lawsuits brought against business corporations for aiding and abetting foreign sovereigns in international law violations.[12]

B. THE DEBATE OVER CORPORATE LIABILITY UNDER THE ATS

While early ATS defendants were usually former foreign government officials, the second wave of ATS lawsuits targeted U.S. and foreign corporations. Indeed, beginning in the 1990s, corporations became some of the most common

6. *See* Burley, *supra* note 4, at 464, 493.
7. Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 801 (D.C. Cir. 1984) (Bork, J., concurring).
8. *Id.* at 822.
9. *E.g.*, Filártiga v. Peña-Irala, 630 F.2d 876, 890 (2d Cir. 1980).
10. *See* Ker v. Illinois, 119 U.S. 436, 444 (1886); Bergman v. De Sieyes, 170 F.2d 360, 361 (2d Cir. 1948). For further discussion of these and other decisions applying customary international law as nonfederal law, see Julian G. Ku, *Customary International Law in State Courts*, 42 VA. J. INT'L L. 265, 291–333 (2001).
11. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 712–14 (2004).
12. *See id.* at 733 n.20.

defendants in ATS cases.[13] As I have argued elsewhere,[14] courts largely ignored the question of corporate liability under the ATS until the 2010 Second Circuit decision *Kiobel v. Royal Dutch Shell Petroleum*.[15] In that case, the court rejected an ATS lawsuit on the grounds that corporations were not subjects of international law and therefore could not be sued in a lawsuit brought under international law.[16] That decision led to several other appellate court opinions[17] and, eventually, a pending Supreme Court decision on the issue.[18]

The *Kiobel* decision sparked a renewed interest in the corporate liability question. In the only prior decision to have considered the corporate liability question in detail, the court based its analysis almost wholly on its reading of international law.[19] It held that corporations had been treated as subjects of international law in prior U.S. case law, in international tribunals like the post-Nazi Nuremberg trials, and in certain international treaties.[20] The idea that international law provides strong precedents for corporate liability is buttressed by some academic support.[21]

However, as the *Kiobel* court held, the weight of international precedents leans heavily against corporate liability for even *jus cogens* violations of international law. When measured against the high standard for international consensus set forth by the Supreme Court in *Sosa*,[22] the international precedents for corporate liability seem inadequate.

Perhaps for this reason, defenders of corporate liability for ATS violations have shifted to a conceptually distinct argument. As long as international law does not prohibit imposing liability on corporations for a particular violation, a country like the United States can do so consistent with its international obligations. Moreover, because U.S. law has long imposed liability on corporations for torts, U.S. courts can do so in ATS cases. This argument was adopted

13. Some studies suggest that over one hundred ATS cases have been filed against corporations. *E.g.*, Jonathan Drimmer, *How to Steer Clear of the U.S. Human Rights Litigation Trend*, 210 ENGINEERING & MINING J. 66, 66 (2009).

14. *See* Julian G. Ku, *The Curious Case of Corporate Liability Under the Alien Tort Statute: A Flawed System of Judicial Lawmaking*, 51 VA. J. INT'L L. 353, 368 (2011).

15. 621 F.3d 111 (2d Cir. 2010).

16. *Id.* at 118–20.

17. *See, e.g.*, Doe VIII v. Exxon Mobil Corp., 654 F.3d 11 (D.C. Cir. 2011); Flomo v. Firestone Natural Rubber Co., 643 F.3d 1013 (7th Cir. 2011); Sarei v. Rio Tinto, PLC, 671 F.3d 736 (9th Cir. 2011).

18. Kiobel v. Royal Dutch Petroleum Co., No. 10-1491 (argued Feb. 28, 2012).

19. Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 256–59 (2d Cir. 2009).

20. *Id.*

21. *See, e.g.*, Harold Hongju Koh, *Separating Myth from Reality About Corporate Responsibility Litigation*, 7 J. INT'L ECON. L. 263, 264–68 (2004); Jordan J. Paust, *Human Rights Responsibilities of Private Corporations*, 35 VAND. J. TRANSNAT'L L. 801, 802–17 (2002); Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443, 475–88 (2001); Beth Stephens, *Corporate Accountability: International Human Rights Litigation Against Corporations in U.S. Courts*, *in* LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW 209, 210–23 (Menno T. Kamminga & Saman Zia-Zarifi eds., 2000).

22. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 731–33 (2004).

by the dissent in *Kiobel*[23] and a variation of it was subsequently adopted by the Seventh and D.C. Circuits.[24] It is also the leading argument in the petitioners' brief in *Kiobel* and that of the U.S. government in its supporting amicus brief.[25]

Although they arise from different foundations, both arguments seek to justify judicial control over how and when corporations can be liable under the ATS. In both cases, the federal courts are believed to have the power to manage any questions that may subsequently arise about entity liability, including questions of mens rea, veil-piercing, and other types of associative liability.

C. THE MISSING POLICY ANALYSIS OF ATS LIABILITY

As discussed above, the ATS has been studied and debated from historical and doctrinal perspectives. Although it has been defended on normative grounds, the policy consequences of ATS litigation have rarely been carefully examined in a rigorous or methodical way. Rather, the "norm development" and "expressive" conceptions of the ATS have largely reigned. Critics have tended to focus on the doctrinal problems with the modern use of the ATS to develop international norms.[26]

In prior work, John Yoo and I offered a different critique of the current expansive use of the ATS that focused on the judiciary's role in the management of ATS litigation.[27] Rather than focus on the doctrinal and historical debates, we argued that the ATS could be usefully analyzed from a practical and functional perspective. Drawing from insights on the relationship between legislative intent and institutional capacity, we argued that the ATS would not always achieve its goals by relying on an independent role for federal courts. Rather, we pointed out that a greater role for the executive, which had a superior institutional capacity to manage the intersection of legal and foreign policies raised by ATS litigation, would offer many functional advantages over the federal court-centered ATS approach.[28]

Our claims were based on an assessment of comparative institutional competence, but we did not (like most ATS scholars) focus on analyzing the policy consequences of ATS litigation. This leads me to where I believe Professor Sykes's economic analysis enters the conversation.

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23. *See* Kiobel v. Royal Dutch Petroleum Co., 642 F.3d 268, 272–78 (2d. Cir. 2011) (Leval, J., dissenting).

24. *See* Doe VIII v. Exxon Mobil Corp., 654 F.3d 11, 41–43 (D.C. Cir. 2011); Flomo v. Firestone Natural Rubber Co., 643 F.3d 1013, 1017–21 (7th Cir. 2011).

25. Brief for Petitioners at 35–38, Kiobel v. Royal Dutch Petroleum Co., No. 10-1491 (Dec. 14, 2011), 2011 WL 6396550; Brief for the United States as Amicus Curiae Supporting Petitioners at 22–31, *Kiobel*, No. 10-1491 (Dec. 21, 2011), 2011 WL 6425363.

26. *See, e,g.*, Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 855–59 (1997); A.M. Weisburd, *State Courts, Federal Courts, and International Cases*, 20 YALE J. INT'L L. 1, 2 (1995).

27. *E.g.*, Julian Ku & John Yoo, *Beyond Formalism in Foreign Affairs: A Functional Approach to the Alien Tort Statute*, 2004 SUP. CT. REV. 153.

28. *Id.* at 181–99.

II. THE IMPORTANCE OF SYKES'S ANALYSIS

Sykes's paper offers the first rigorous economic analysis of corporate liability under the ATS, drawing upon the law and economics literature of tort and vicarious liability rules. It offers the type of frank and openly consequentialist analysis that has been sorely missing from the ATS corporate liability literature. He lays open his assumptions, he makes his positive claims, and he explains how changes in his assumptions could change his analysis.

Pro-ATS corporate liability literature, to the extent it has made consequentialist claims, often makes undefended assumptions of deterrence or speculative claims about the expressive significance of ATS litigation.[29] Anti-ATS literature has perhaps overstated the deterrent effect of ATS litigation as well, suggesting that the threat of ATS litigation could actually lead to the collapse of foreign investment without offering a detailed theoretical analysis of how or why such levels of deterrence would occur.[30] Professor Sykes's analysis and conclusions add a much-needed balanced and sensible perspective to this conversation. Here are what I consider the key contributions of Professor Sykes's study to the ongoing debate over the ATS.

First, Professor Sykes points out that there is the likelihood of higher litigation errors in ATS litigation.[31] Why? Virtually all ATS cases involve claims by aliens about injuries they suffered in foreign jurisdictions. As a result, reliable evidence is likely to be more difficult to obtain. Also, juries might be more biased over facts arising out of foreign countries.

Because few ATS cases have gone to trial, courts do not have much experience managing discovery in ATS cases. Almost all of the litigation errors Sykes identifies are the same kinds that would arise in any transnational tort case, whether or not the ATS was invoked. Still, due to the ATS's jurisdictional requirements, almost every ATS case arises out of incidents that occurred in a foreign jurisdiction and would require discovery for facts that occurred in that foreign jurisdiction.[32] Moreover, unlike a non-ATS transnational tort case, ATS cases are likely to face even more difficult challenges because they almost always involve allegations that the host government was primarily involved in the alleged international law violation. Because extraterritorial discovery usu-

29. *See, e.g.*, Harold Hongju Koh, *A United States Human Rights Policy for the 21st Century*, 46 ST. LOUIS U. L.J. 293, 315 (2002) ("Although most of the judgments rendered by United States courts in these transnational human rights cases remain uncollected, they have nevertheless contributed to the other goals of norm-enunciation, deterrence and denial of safe haven.").

30. *See, e.g.*, GARY CLYDE HUFBAUER & NICHOLAS K. MITROKOSTAS, AWAKENING MONSTER: THE ALIEN TORT STATUTE OF 1789, 41–42 (2003).

31. Alan O. Sykes, *Corporate Liability for Extraterritorial Torts Under the Alien Tort Statute and Beyond: An Economic Analysis*, 100 GEO. L.J. 2189–91 (2012).

32. The four recent appellate decisions on ATS corporate liability also illustrate this point nicely. All four involved allegations by aliens about activities in foreign jurisdictions. *See* Doe VIII v. Exxon Mobil Corp., 654 F.3d 11 (D.C. Cir. 2011) (Indonesia); Flomo v. Firestone Natural Rubber Co., 643 F.3d 1013 (7th Cir. 2011) (Liberia); Sarei v. Rio Tinto, PLC, 671 F.3d 736 (9th Cir. 2011) (Papua New Guinea); Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111 (2d Cir. 2010) (Nigeria).

ally requires at least some cooperation from a foreign government, it is easy to imagine that all ATS cases face enormous obstacles in acquiring the facts necessary for the court to make a nonerroneous judgment. At the very least, the extreme difficulty of acquiring reliable extraterritorial facts should, as Sykes points out,[33] be considered as a cost when weighing the use of the ATS.

Second, Sykes points out that ATS cases are likely to increase the risk of foreign sovereign backlash against the United States government.[34] Because ATS lawsuits must be brought under international law, a foreign sovereign's conduct is almost always the factual basis for the ATS claim. It is not surprising that foreign sovereigns have almost uniformly opposed ATS lawsuits that relate to their conduct. This has been true even in cases where the underlying conduct involved a prior regime.[35] In corporate cases, the ATS defendant is often incorporated in a third party state whose conduct is not at issue. Nonetheless, even in those cases, foreign sovereigns have often strongly objected to the extraterritorial application of the ATS to their corporate nationals.[36]

Third, Professor Sykes suggests that corporations that are not subject to lawsuit in the United States can escape liability under the ATS, thus disadvantaging corporations that do business in the United States.[37] The possibility that corporations can either restructure themselves to avoid personal jurisdiction or that some corporations will simply avoid the U.S., poses a severe challenge to those who claim the ATS will deter international atrocities. Using the *Talisman Sudan* case as an example, Professor Sykes points out that that particular lawsuit probably had zero effect in deterring humanitarian atrocities in Sudan. In fact, it may increase the likelihood of atrocities by substituting Chinese and Russian corporations for American or European ones. This is not to say corporate ATS litigation will have no deterrent effect. But Professor Sykes's analysis points out that the effect will likely be far less than most ATS advocates claim.[38]

CONCLUSION

Professor Sykes's contribution should lead scholars and advocates to think about the ATS with a clear, rather than wishful, eye. Although we wish that ATS litigation would deter and prevent humanitarian atrocities, punish wrongdoers correctly (and efficiently), and improve the U.S. government's relationship with

33. Sykes, *supra* note 31, at 2190–91.

34. *Id.* at 2191–93.

35. *See, e.g.*, *In re* S. African Apartheid Litig., 346 F. Supp. 2d 538, 553 (S.D.N.Y. 2004) (citing Declaration of Justice Minister Penuell Mpapa Maduna to U.S. District Judge John E. Sprizzo (July 11, 2003)).

36. *See* Brief of the Governments of the United Kingdom of Great Britain and Northern Ireland et al. as Amici Curiae in Support of the Respondents, Kiobel v. Royal Dutch Petroleum Co., No. 10-1491 (Feb. 3, 2012), 2012 WL 405480.

37. Sykes, *supra* note 31, at 2194–96.

38. *Id.*

foreign sovereigns, Professor Sykes demonstrates that almost none of these wishes are likely to come true under the current expansive view of the ATS. At the very least, he places the burden on those supporters to prove otherwise or for critics to offer alternative models.

One alternative model for punishing and deterring international atrocities is through a legal framework modeled on the Foreign Corrupt Practices Act.[39] This framework would take advantage of the executive branch's resources and superior ability to gather information overseas. Rather than relying on private litigants to bring cases and engage in court-supported discovery, we might rely on the resources of the executive branch to acquire and verify key facts, just as it does in Foreign Corrupt Practices Act investigations.[40]

Additionally, we might also imagine that the executive branch would be better positioned to handle complaints raised by foreign sovereigns about such investigations and to calibrate the intensity and nature of such investigations to account for U.S. foreign policy interests. This does not mean that such investigations would never go forward, but that they would account for foreign policy impacts in a way that current ATS lawsuits are designed to avoid.

Executive supervision is unlikely to overcome the problem of foreign corporations escaping U.S. jurisdiction and thus putting U.S. companies at a disadvantage. Yet it is also true that the ability to exercise prosecutorial discretion would enable the executive branch to decide when an action would be counterproductive (due to the existence of competing nonprosecutable foreign corporations) and when it would not. Such flexibility and discretion could not be wielded by a federal court hearing an ATS claim.[41]

I believe Professor Sykes has opened a new and important front in the study of the ATS: What are the practical benefits and costs of permitting ATS lawsuits against corporations? This question has been largely ignored in the literature and by the courts. But it should be front and center in any aspect of the study of the ATS going forward, especially if the Supreme Court's decision in *Kiobel* preserves the central role for courts in controlling ATS lawsuits against corporations.

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39. 15 U.S.C. § 78dd-1 (2006).

40. *See* Ken Avery et al., *Managing the Business Risk of Fraud: Considerations and Renewed Focus for the Current Environment*, *in* POCKET MBA: FINANCE FOR LAWYERS SUMMER 2011, at 225, 229 (2011) (noting that DOJ criminal fraud unit has requested increased resources and that the SEC has created a dedicated FCPA unit).

41. *See* Ku & Yoo, *supra* note 27, at 195.